FRIEDMAN & ANSPACH
Attorneys at Law
1500 Broadway
New York, New York 10036
(212) 354-4500

EUGENE S. FRIEDMAN
WILLIAM ANSPACH
ANUSHA RASALINGAM
JAE W. CHUN

DANIEL TREIMAN
LEO GERTNER
JESS HALLAM

FAX: (212) 719-9072
www friedmananspach.com

April 28, 2023

VIA Electronic Filing

Jennifer Abruzzo, General Counsel
National Labor Relations Board
Attn: Office of Appeals
1015 Half Street SE
Washington, DC 20570-0001

Re: United Metro Energy Corp./United Apollo Petroleum Transportation Corp./United Apollo Transportation
Case No. 29-CA-309686

Dear Ms. Abruzzo:

We represent Local 553, IBT (the "Union" or "Local 553"), the charging party in the above referenced matter against United Metro Energy Corp./United Apollo Petroleum Transportation Corp./United Apollo Transportation Corp. (collectively, "UMEC" or the "Employer"), which alleges that the Employer refused to bargain for a successor collective bargaining agreement and unilaterally increased wages in violation of the Act.

We write to appeal Region 29's dismissal of the charge. See Region 29's dismissal letter, dated March 31, 2023, attached hereto as Exh. A.[1] As discussed below, the dismissal must be reversed because it is based on a gross misreading of the facts in the case, ignores a controlling term of the parties' agreement, and fails to apply well-settled doctrine that actual execution of a collective bargaining agreement is not a requirement for binding the parties.

[1] The Union timely filed and was granted an extension to submit this appeal until April 28, 2023.

Facts

Local 553 represents fuel drivers and service technicians throughout New York City and its environs. The Employer purchased the business in a 2013 bankruptcy sale. Its predecessor was a party to two separate collective bargaining agreements (CBA) with the Union. The first was a series of CBAs between the Union and an association of fuel employers, called the "Master Contract"), dating back to the 1960s, which applied to all of its retail delivery drivers, i.e., those making deliveries to residential homes, commercial real estate, stores, schools, and the like. The second CBA was called the Bulk Contract, and applied to drivers making wholesale (usually in large amounts) deliveries to, for example, gas stations, airports, marinas, and terminals.

Following the purchase of the business, UMEC voluntarily recognized the Union as the collective bargaining representative of all drivers. The specific drivers who were previously covered by the Master Contract continued to receive the pay and benefits from that CBA, and those who were covered by the Bulk Contract continued to receive the pay and benefits from the existing Bulk Contract for one year until the parties negotiated successor contracts.

In 2017, the Union and the Employer signed an agreement—Memorandum of Agreement (the "MOA")—which contained the following provision:

> The Employer shall honor and *be bound by and execute* the Local 553 Fuel Industry Master contract as of March 1, 2017 expiring December 15, 2019 which shall initially cover five (5) drivers performing retail delivery work who shall be chosen by seniority from the current bulk seniority list. (emphasis added.)

See Par. 11 of the Memorandum of Agreement ("MOA"), attached hereto as Exh. B.

The "Local 553 Fuel Industry Master contract" referenced in the MOA was the extant Master Contract between the Union and the employer association, which had a term from 2016 to December 15, 2019. From that point on, the Employer applied a succession of Master Contracts to the five most senior drivers who were performing retail delivery work, including paying them the rates and benefits (including pension contributions) set forth in the coterminous Master Contract until the Employer sent the Union a letter, dated December 2, 2022, stating it would not bargain a successor Master Contract. See Employer's letter, dated Dec. 2, 2022, attached hereto as Exh. C. Despite the clear language in the MOA and the Employer's adherence to its terms over the past several years, the Employer stated that it had no obligation to maintain the Master Contract wages for any driver, but provided them anyway simply because it "[did] not wish to 'hurt' these two (2) current employees."

On or about December 12, 2022, UMEC unilaterally increased the wages for two of its drivers without notice to the Union and without giving the Union an opportunity to bargain. In fact, UMEC refused to meet with the Union concerning this issue.

Argument

I. The Employer is bound by the Master Contract through its express adoption written in the Memorandum of Agreement

The Region's dismissal must be reversed because the MOA expressly states that the Employer agrees to "honor and be bound by and execute the Local 553 Fuel Industry Master Contract . . . "

Section 8(d) of the Act requires "either party, upon the request of the other party, to execute a written contract incorporating an agreement reached during negotiations." See 29 U.S.C § 158(d); see also, International Union of Operating Engineers, Local 501, 366 NLRB No. 3 (2018).

It is well-established that a memorandum of agreement which specifically references another collective bargaining agreement binds the signatories to that latter agreement. See In re Laborers' Intl. Union of North America, Local No. 118, 260 NLRB 1417 (1982) (employer who signed a memorandum of agreement "expressly adopt[ing] the master agreement" with the union bound by the master agreement); A & M Trucking, Inc., 314 NLRB 991 (1994) (memorandum was valid agreement with fixed duration, reduced to writing, and executed by parties); In re Sheet Metal Workers' Int'l Ass'n, Local Union No. 270, 144 NLRB 773 (1963) (interim agreement binds employer to subsequent master agreement, even though the final terms of the latter agreement were not known and contained provisions that the employer ultimately disagreed with and refused to honor); In re Franchi Bros. Constr. Corp., 232 NLRB 179 (1977) ("The purport and meaning of the memorandum was undoubtedly an agreement by Respondent with Local 48 whereby it agreed with that Local Union to abide by the terms of the [master] agreement upon execution[.]")

Here, the parties reached an express agreement in the MOA that bound the Employer to the Master Contract. The MOA stated explicitly that UMEC would "honor and be bound by and execute the Local 553 Fuel Industry Master Contract as of March 1, 2017 expiring December 15, 2019[.]"

Hence, the Region incorrectly concluded that the MOA incorporated the Master

Contract into the Bulk Contract. In paragraph 11 of the MOA, the parties expressly agreed to be bound by and execute the Master Contract independent of anything else that might relate to the Bulk Contract. There is nothing in the MOA or the parties' conduct that followed which indicates that the parties intended to incorporate the Master Contract by reference into the Bulk Contract, which would have been contrary to the clear and express terms of the MOA. The MOA did not mention any terms of the Master Contract that should be incorporated into the Bulk Contract; indeed, there is no term, such as "modify" or "adopt" or "incorporate," in the MOA that support the Region's reading.

In short, UMEC explicitly agreed to "be bound by and execute" the Master Contract and therefore is a party to it independent of its obligations concerning the bulk delivery drivers and the Bulk Contract. The Employer's refusal to bargain a successor Master Contract is therefore a violation of Sections 8(a)(1) and (5) of the Act.

II. UMEC's failure to execute the Master Contract is immaterial to whether it was bound

The dismissal must also be reversed because it is immaterial that the Employer never actually signed a Master Contract as it agreed in writing to do in the MOA.

The Board has long held that formal execution is not a requirement to finding that a party is bound to an agreement. See Mt. Airy Found., 230 NLRB 668, 677 (1977) (finding that parties reached agreement based on three documents incorporating all final proposals of one party); Heidelberg Distributing Company, 364 NLRB. No. 148 (2016) (parties' communications with each other must show they objectively manifested intent); Teamsters Local 771 (Ready-Mix Concrete), 357 NLRB 2203, 2207 (2011) (finding "meeting of the minds" where parties shook hands and showed "mutual expressions of satisfaction"); Health Care Workers Union, Local 250, 341 NLRB 1034, 1037 (finding unlawful failure to execute agreement where union failed to respond to "draft agreement"); Fashion Furniture Mfg., Inc., 279 NLRB 705, 706 (1986) (the need for "minor alterations" in written agreement does not excuse failure to execute agreement); Coral Reef Nursing and Rehabilitation Center, LLC, 369 NLRB No. 47, slip op. at 13 (2020) (Board upheld finding of failure to execute agreement where ALJ found negotiator's statement she would have executive director review agreement within one to two weeks was a "formality").

Whether the parties had a "meeting of the minds" on all substantive issues and materials terms occurred must be determined from its communications with each other. Crittenton Hospital, 343 NLRB 717, 718 (2004); Diplomat Envelope Corp., 263 NLRB 525, 535-536 (1982), enfd. 760 F.2d 253 (2d Cir. 1985). See Bennett Packaging Co. of Ky., Inc., 285

NLRB 602, 608 (1987) (technical rules of contract law do not control); Fashion Furniture Mfg., Inc., 279 NLRB 705, 706 (1986). See Delta Sandblasting Co., Inc., 367 NLRB No. 17, slip op. at 9 (Board may evaluate the parties' conduct against the backdrop of their prior negotiations) (citing Electrical Workers IBEW Local 938, 200 NLRB 850 (1972), enfd. 492 F.2d 1240 (4th Cir. 1974)).

Here, there is no question that the MOA demonstrated the Union and the Employer's meeting of the minds and their intent to be bound by the Master Contract with respect to the retail drivers. The plain meaning of the words "be bound by" and "execute" demonstrate UMEC's intent to be bound by the Master Contract, even if it did not execute the agreement. The MOA was also a valid instrument to bind the parties to a separate collective bargaining agreement. See In re Sheet Metal Workers' Int'l Ass'n, Local Union No. 270, 144 NLRB 773 (1963); In re Franchi Bros. Constr. Corp., 232 NLRB 179 (1977). Therefore, UMEC's execution was not necessary to bind it to the substantive terms of the Master Contract and generate a duty to bargain.

III. UMEC violated its duty to bargain a successor agreement to the Master Contract and instead unilaterally changed its terms and conditions

The Region concluded in its dismissal letter that the increase in wages that the Employer granted the retail drivers was an established term and condition of employment based on an established practice of applying Master Contract rates to those drivers (presumably under the Bulk Contract signed by both parties). As discussed above, the MOA actually bound the Employer to the Master Contract itself, which had expired and the Union was seeking to renegotiate. The Employer refused to bargain and unilaterally increased the wage rates of the employees under the Master Contract.

An employer must continue to bargain with a union after the expiration of an agreement. Nova Plumbing, Inc. v. NLRB, 330 F.3d 531, 534 (D.C. Cir. 2003) It is also well-established that "where an employer ignores or simply makes no attempt to honor union requests to bargain" it violates its duty to bargain. Natl. Mgmt. Consultants, Inc., 313 NLRB 405 (1993) (citing Franchet Metal Craft, 262 NLRB 552, 554 (1982)). The Act requires "requires an employer 'to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment.'" PPG Industries Ohio, Inc., 372 NLRB No. 78 (2023) (citing NLRB v. Katz, 369 U.S. 736, 742-743 (1962)). Furthermore, employer may not unilaterally repudiate a valid collective bargaining agreement. See 29 USC § 158(d); Auciello Iron Works v. NLRB, 517 U.S. 781, 786 (1996) (unions have presumption of majority status during collective bargaining agreement and thus withdrawal is prohibited); Valley Central Emergency Veterinary Hospital, 349 NLRB 1126 (2007) (employer was bound by agreement and therefore unlawfully repudiated

agreement). See also Brower's Moving & Storage, Inc., 297 NLRB 207 (1989) (no evidence that union repudiated agreement or negated intent to enter bargaining relationship).

Here, UMEC and Local 553 executed the MOA in 2017, binding the Employer to the Master Contract as to certain of its drivers. When that Master Contract expired, UMEC adopted a series of successor Master Contracts, with the Union's knowledge and acquiescence, honoring not only the wage rates set forth in the successor Master Contracts but also all of the benefits including pension fund contributions and the other terms and conditions of the Master Contract. The Employer is well within its rights to bargain down some of the terms in a successor Master Contract, but cannot simply ignore its obligation to bargain with the Union concerning the affected drivers. See Brower's Moving & Storage, Inc., 297 NLRB 207, 208 (1989) (employer was bound to agreement negotiated by association despite not being a member and employees not being aware of contract). By refusing to do so, and unilaterally setting new wage rates for certain drivers, the Employer has violated the Act. See Laborers Health and Welfare Trust v. Advanced Lightweight Concrete, 484 U.S. 539 (1988); NLRB v. Katz, 369 U.S. 736, 743-748 (1962); Great Southern Fire Protection, Inc., 325 NLRB 9 (1997).

Conclusion

For the foregoing reasons, we respectfully request that the General Counsel reverse the Region's dismissal and direct that a Complaint be issued to remedy the Employer's violations of the Act.

Thank you for your consideration.

Respectfully submitted,

Leo Gertner

cc: Theresa Poor, Regional Director (via electronic filing and email)
Demos Demopoulos, Secretary Treasurer, Local 553 IBT (via email)